



Supreme Court, U.S.
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OFFICE OF THE CLERK
IN THE
Supreme Court of the United States

NATIONAL TAXPAYERS UNION,

Petitioner,

v.

UNITED STATES SOCIAL SECURITY
ADMINISTRATION, OFFICE OF THE
INSPECTOR GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the Third and Fourth Circuits overrule the holding of *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600 (2003) (“Telemarketing Associates”) that the First Amendment allows punishment of charitable solicitation **only** for actual fraud?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is not yet officially reported. It is reported so far at 2008 U.S. App. LEXIS 25802, 2008 WL 5175066 (3^d Cir. 2008).

The decision of the Department of Health and Human Services Departmental Appeals Board is reported at *Social Security Administration v. National Taxpayers Union*, CR No. 1543, 2006 HHSDAB LEXIS 209 (2006). Petitioner has been unable to find any official reports for this agency.

JURISDICTION

A. Timeliness

The decision of the Court of Appeals sought to be reviewed was entered on December 11, 2008.¹ Petitioner filed a timely petition for rehearing to the panel of the Court of Appeals which was denied by order entered January 9, 2009.²

B. Jurisdiction

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under 28 U.S.C. §1254, which is cross referenced as the applicable review provision for cases such as this one in 42 U.S.C. §1320a-7a (e).

1. 1a

2. 58a

C. Notice

The Solicitor General of the United States has been served in compliance with Rule 29.4(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. First Amendment to the United States Constitution (Excerpt)

Congress shall make no law . . . abridging the freedom of speech . . .

B. 42 U.S.C. §1320b-10(a)(1), Social Security Act §1140 (“§1140”), as amended (Excerpt)

No person may use, in connection with any item constituting an advertisement, solicitation, circular, book, pamphlet or other communication . . . , alone or with other words, symbols or emblems—(A) the words ‘Social Security’ . . . in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed or authorized by the Social Security Administration . . .

STATEMENT OF THE CASE

A. Basis for Jurisdiction in the Court of Appeals

42 U.S.C. §1320b-10(c)(1), part of §1140, incorporates by reference 42 U.S.C. 1320a-7a(e), which provides for judicial review by petition for review of final agency decisions imposing monetary penalties in the United States Court of Appeals where the agency respondent resides, which is interpreted for a corporation as the state of incorporation. See *Federal Power Comm'n v. Texaco, Inc.*, 377 U.S. 33 (1964). Since petitioner is a Delaware not for profit corporation, this provides for review in the United States Court of Appeals for the Third Circuit. Petitioner filed a timely petition for review in the United States Court of Appeals for the Third Circuit after the agency decision, thus conferring jurisdiction on that court.

B. Facts

1. The Mailings

Petitioner National Taxpayers Union (“NTU”) is a charitable organization, specifically, a Delaware not for profit corporation registered as a charity under §501(c) of the Internal Revenue Code. NTU has functioned, since its founding in 1973, as a taxpayer advocacy group, with many successes, such as the Taxpayers Bill of Rights. In 2001, NTU’s board of directors decided to take a position in support of private investment accounts for social security, and, thereafter, NTU mailed copies of a direct mail solicitation on the subject. The solicitation contained a survey and advocated for private

investment accounts and also included a summary of the background of NTU as an organization. It also contained the words, "Social Security," on the envelope and statement that it was an official survey for the President, Congress and Social Security Administration.

2. Proceedings

a. Agency

Respondent Social Security Administration ("SSA") sent NTU a letter imposing a \$274,582 monetary penalty under §1140. NTU then invoked the agency's administrative review procedure by filing a request for a hearing. NTU's hearing request included a claim that §1140 was unconstitutional as applied under the First Amendment, because it punished charitable solicitation without a finding of actual fraud.³

The agency conducted a hearing before the Department of Health and Human Services Departmental Appeals Board ("HHS DAB") Civil Remedies Division. In a prior case, *SSA v. Nat'l Fed'n of Retired Persons*, ("Retired Persons"),⁴ HHS DAB's Appellate Division (1) ruled that HHS DAB would not consider unconstitutional as applied claims and (2) broadly interpreted §1140 and held that §1140 had two liability standards—(i) a knowledge standard ("knows or should know"), which HHS DAB interpreted

3. Request for Hearing in record below.

4. Excerpts from *Retired Persons* are in Appendix starting at 60a. The entire opinion is in the record below.

as *mere negligence*,⁵ and (ii) a “reasonableness standard,”⁶ which HHS DAB interpreted as strict liability *not even requiring a false statement*.⁷ The agency itself has referred to its interpretation of §1140 as setting a “uniquely low threshold of liability.” See *Social Security Admin. v. United Seniors Ass’n, Inc.*, 2003 HHSDAB LEXIS 110 at *10 (2003). See also, *id.* at *8 (§1140 “creates a very low threshold for liability.”).

Following *Retired Persons*, the ALJ in this case refused to consider NTU’s as applied challenge and affirmed SSA’s \$274,582 monetary penalty based on findings that NTU’s solicitations violated the “knowledge” standard⁸ and the “reasonableness” standard, relying on *Retired Persons*.⁹ The ALJ made *no* finding that NTU had committed actual fraud.¹⁰ Thereafter, NTU sought review in the HHSDAB Appellate Division, which took no action,¹¹ after which the Commissioner’s inaction resulted in the HHS DAB decision becoming final.

5. 63a (“Section 1140’s knowledge standard is in fact a negligence standard.”).

6. 62a.

7. 62a (“. . . section 1140 does not require a factual misrepresentation or proof that some person was actually deceived . . .”).

8. 44a

9. 28a

10. 18a (ALJ opinion).

11. 15a

b. Appellate Review

(i) Petition for Review

NTU filed a timely petition for review in the United States Court of Appeals for the Third Circuit. NTU argued, *inter alia*, that the imposition of a penalty on it for a charitable solicitation violated the First Amendment, as applied, because this Court had established the rule in the *Schaumburg* line of cases, culminating in *Telemarketing Associates*, *supra*,¹² that proof of actual fraud was the *sine qua non* to punish charitable speech. In 2005, the Fourth Circuit had rejected this position in denying a First Amendment claim. See *United Seniors Ass'n, Inc. v. Social Security Administration*, 423 F. 3d 397 (4th Cir. 2005), cert. denied, 547 U.S. 1162 (2006) ("United Seniors"). See 423 F. 3d 407 (One who "should have known that the message conveyed the false impression of governmental endorsement" . . . "is not entitled to First Amendment protection."). NTU argued to the Third Circuit, *inter alia*, that *United Seniors* was wrongly decided and violated the clear statement that this Court had made in *Telemarketing Associates* that the "exacting proof requirements" of a common law deceit or fraud claim are required to provide "sufficient breathing room for protected speech." 538 U.S. at 620. NTU also relied on these cases to claim full First Amendment protection

12. See *Village of Schaumburg v. Citizens for a Better Environment*, 414 U.S. 620 (1980) ("Schaumburg"); *Secretary of State of Maryland v. Jos. H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. Nat'l Wildlife Fed'n*, 487 U.S. 781 (1988) ("Riley"); *Telemarketing Associates*, *supra*.

for its mailings; “[o]ur prior cases teach that the solicitation of charitable contributions is protected speech.” *Riley, supra*, 487 U.S. at 789.

(ii) The Third Circuit’s Decision.

The Court of Appeals denied NTU’s petition for review in an opinion authored by Circuit Judge Fuentes marked “not precedential.”¹³ The opinion’s response to NTU’s argument that §1140 violated the First Amendment, as applied, because it “penalizes the organization’s speech without finding ‘actual intent to defraud,’” was that “[t]his assertion requires little analysis, because it is based on an incorrect reading of [Schaumburg].”¹⁴ The Court then read *Schaumburg* to allow punishment with no proof of fraud where the government has a “sufficiently strong subordinating interest,”¹⁵ finding that countervailing governmental interest in Congress’ desire to be sure recipients open government mail.¹⁶ The Court said that “[m]ail that appears to be from the Social Security Administration piques beneficiaries’ interest and induces them to read and respond accordingly,”¹⁷ which the Court felt violated Congress’ purpose “to protect seniors and other beneficiaries from fraud.”¹⁸ However, the Court of Appeals ignored the fact that SSA conceded before the

13. 1a

14. 5a

15. 5a

16. 5a-6a

17. 5a

18. *Id.*

Agency that NTU's survey solicitation did *not* look like government mail.¹⁹

Judge Fuentes read *Telemarketing Associates*' holding that *fraudulent* charitable solicitation is unprotected speech to mean that "... the First Amendment does not protect a speaker who uses the prohibited language in such a way that he or she 'should know' that the message will mislead or deceive the reader."²⁰

REASONS FOR GRANTING THE PETITION

1. The Third and Fourth Circuits Have Overruled *Telemarketing Associates*-Rule 10(c)

Recently, in the Melville B. Nimmer Memorial Lecture, UCLA Law School Dean Varat said:

... [i]t is essential to emphasize that the First Amendment usually mandates government precision to target at most only the deceptive factual statement that legitimately can ground legal liability. *Take charitable solicitation, for example. Only actual fraud, not the potential for misleading speech, may be controlled.*²¹

The authority Dean Varat cited for this statement was *Telemarketing Associates*.²² *Telemarketing Associates*

19. Order of March 13, 2006 by A.L.J., page 2, in record below but not in Appendices to this petition.

20. 8a

21. J. D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 U.C.L.A. L. Rev. 1107, 1127 and n. 74 (2006) (emphasis supplied).

22. He also cited the other 3 cases in the Schaumburg line.

and the rest of the *Schaumburg* line are the *New York Times v. Sullivan*²³ of charitable solicitation, demarcating a very clear line beyond which government may not punish such speech. Indeed, this Court's opinion in *Telemarketing Associates* recognizes the relationship to *New York Times v. Sullivan* by specifically pointing out that both cases draw a line in exacting proof requirements that "provide sufficient breathing room for protected speech."²⁴

In both this case and *United Seniors*, the Courts of Appeals have overruled *Telemarketing Associates* and the *Schaumburg* line. In this case, the Third Circuit did so by holding that a countervailing government interest allows punishment of charitable solicitation for less than actual fraud, the precise position that *Schaumberg* had, in fact, rejected. See 444 U.S. at 639 ("Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient . . . the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech or press.").²⁵ The Third Circuit also

23. 376 U.S. 254 (1964).

24. 538 U.S. at 620.

25. See also, *Riley, supra*, 487 U.S. at 795.

In striking down this portion of the Act, we do not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it. Further, North Carolina may constitutionally require fundraisers to disclose certain financial information

(Cont'd)

read *Telemarketing Associates* to sustain a "should know" (i.e., negligence) standard,²⁶ even though this Court's opinion drew a clear line at actual fraud.²⁷ *United Seniors* also sanctions a negligence standard.²⁸

NTU believes that this Court should grant the writ to prevent the lower courts from misreading this Court's definitive decisions in the important area of charitable solicitations and the First Amendment simply to reach an improper result of overruling these decisions. Although this Court does not take cases just to reverse error, a seriously wrong decision on a core subject of constitutional law is generally treated as sufficient to warrant a grant of certiorari. See W. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 Mercer L. Rev. 1015, 1027 (1984); S Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 619 (1984).

(Cont'd)

to the State, as it has since 1981.*** If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.

(citation omitted at ellipses).

26. 8a.

27. 538 U.S. at 620.

28. 423 F. 3d at 407.

2. Importance

In the First Amendment area, it has often been this Court's practice to grant certiorari *solely* because of the importance of the question presented. See, e.g., *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 5 (2004) ("In light of the obvious importance of that decision, we granted certiorari to review the First Amendment issue . . ."). See also, *City of San Diego v. Roe*, 543 U.S. 77 (2004) (certiorari granted solely because of First Amendment question). Moreover, this Court has also granted certiorari, regardless of the nature of the decision below, to assure that the lower courts do not erode important First Amendment protections. For example, after the decision in *New York Times v. Sullivan*, *supra*, this Court granted certiorari in several cases solely because the lower courts had stingily misread the decision to narrow First Amendment protections. See, e.g., *Ocala Star Banner Co. v. Damron*, 401 U.S. 295 (1971); *Monitor Patriot Co. v. Roy*, 401 U. S. 265 (1971); *St. Amant v. Thompson*, 390 U.S. 727 (1968). Former Chief Justice Rehnquist has noted that the perception that "the lower-court decision may well be***of general importance beyond its effect on these particular litigants" is an important factor in granting certiorari. See W. Rehnquist, *The Supreme Court* 234 (2001). NTU believes this case has importance to all charitable organizations, particularly citizen's advocacy groups. The former Chief Justice has also noted that the "perception that the decision is wrong in light of Supreme Court precedent," *id.* at 235, combines with importance to be the major factor supporting a certiorari grant.

3. No Circuit Conflict-Rule 10(a).

While this Court often looks for a Circuit conflict as a reason for granting the writ, this is part of the larger concept that this Court should let the law proceed until a trend develops before jumping in to make constitutional law or reaching out to declare a statute unconstitutional. However, two circuits have now emphatically taken a narrow view of the First Amendment in the face of the same very broad agency interpretation of §1140 that directly impinges on protected speech. This is an important trend. This trend makes it unlikely that others will have the courage to further raise constitutional challenges to §1140, in light of its draconian monetary penalty threats.²⁹ Faced with a SSA demand, a charitable solicitor would be foolhardy, in light of the trend of the Third and Fourth Circuits and §1140's massive fine authorization, to gamble that, after exhausting an administrative process, the charitable solicitor will be lucky enough to find a Circuit to buck the trend. Certainly, the advice of most counsel would be to settle or withdraw.

"Chill and uncertainty," *Riley, supra*, 487 U.S. at 794, were major factors identified by this Court as motivating its actions in this area of the law. Because of the chill of the Third and Fourth Circuit decisions, it is now unrealistic to believe that a Circuit conflict will develop in normal course, and there is no longer any

29. §1140 authorizes a penalty of **\$5000 per piece mailed**. See 42 U.S.C. §1320b-10(b) (emphasis supplied). In the present case, which involved a very modest test direct mail solicitation of about 500,000 pieces, NTU was exposed to the risk of a \$2,745,820,000 fine.

justification to wait for one before addressing the issue that these two Circuits have so mishandled. This is particularly true, because §1140, in authorizing massive penalties for speech, gives SSA a potent tool with which to attack its critics. Long-standing, donation-funded citizen's advocacy groups like NTU serve an important function in our democracy, and the Third and Fourth Circuit's decisions place their very existence at risk.

4. Not Precedential

While it is not always the announced practice in this Court to take cases that make no precedent, the Court has regularly done so where the issue is important and the decision below is likely wrong in light of precedent. See, e.g., *Kane v. Garcia Espitia*, 546 U.S. 9 (2005); *Dye v. Hofbauer*, 546 U.S. 1 (2005); *Illinois v. Fisher*, 540 U.S. 544 (2004); *United States v. Flores-Montano*, 541 U. S. 149 (2004). The Third Circuit panel's decision to mark its opinion not precedential can have no other purpose than to avoid review here. See J. Cole and E. Bucklo, *A Life Well Lived: An Interview with Justice John Paul Stevens*, 32 Litigation 8, 67 (2006), where the authors quote Justice Stevens as saying he tends to vote to grant more on unpublished opinions "on the theory that occasionally judges will use the unpublished opinion to reach a decision that might be a little hard to justify."

Certainly, the marking of the Third Circuit's decision as "not precedential" is an abuse of any criteria for unpublished opinions, since the issue of whether §1140 violated the First Amendment as applied to charitable solicitation had never been addressed in the Third Circuit and had been considered only once elsewhere, in *United Seniors*.³⁰ Moreover, the decision to read *Schaumburg* to hold the opposite of its declared meaning that the fraud requirement cannot be bent by a countervailing governmental interest cannot be characterized as a simple fact-based decision of no general importance. Indeed, when this point is combined with the certainty that the Third Circuit's opinion, whatever its marking, will be found by anybody Shepardizing either §1140 or *United Seniors*, and then read and followed, preventing the damaging fiction that it is not a precedent is itself sufficient reason to grant certiorari.

30. According to the Third Circuit's own rules, a decision will be marked non precedential if it "appears to have value only to the trial court or the parties." Third Circuit Internal Operating Procedures, §5.3.

CONCLUSION

The Court is requested to grant the writ of certiorari.

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APPENDIX

**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT FILED DECEMBER 11, 2008**

NOT PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 07-3381

NATIONAL TAXPAYERS UNION,

Petitioner

v.

UNITED STATES SOCIAL SECURITY
ADMINISTRATION; OFFICE OF THE
INSPECTOR GENERAL,

Respondent.

Petition for Review of Final Decision of
Commission of Social Security Administration
(HHS-1:07-43)

Argued November 20, 2008

Before: FUENTES, HARDIMAN, and GARTH,
Circuit Judges
Filed December 11, 2008

Appendix A

OPINION OF THE COURT

FUENTES, *Circuit Judge*:

The National Taxpayers Union (“NTU”) petitions for review of a decision of the Department of Health and Human Services Departmental Appeals Board that upheld a determination by an administrative law judge (“ALJ”) who found that NTU mailed correspondence that used “social security” in a manner that violated Section 1140 of the Social Security Act, 42 U.S.C. § 1320b-10. The Appeals Board also affirmed the ALJ’s imposition of a civil penalty of \$274,582 against NTU. Because we find that Section 1140(a)(1) is neither unconstitutional as-applied, nor unconstitutionally overbroad, and that the ALJ’s decision is supported by substantial evidence, we deny the petition for review.¹

I. Facts

NTU is a not-for-profit taxpayer advocacy organization. In 2001, NTU sent thousands of direct mail pieces to consumers to solicit donations. The brochures included language in large, red, bold type that stated, “Official National Survey on Social Security.” The brochures also included the statement that it was “commissioned by the NTU for the Social Security Administration, White House, and Congress of the United States.” The Social Security Administration (“SSA”) received a complaint, and the Inspector General

1. We have jurisdiction pursuant to 42 U.S.C. § 1320a-7a(e).

Appendix A

of the SSA determined that the mailing violated Section 1140 of the Social Security Act. Section 1140 prohibits the use of nineteen phrases, including “social security,” in a manner that either (1) the writer knows or should know, or (2) the reader could reasonably perceive as conveying the false impression of official endorsement of the material by the SSA or the government. The Inspector General sent a cease-and-desist letter to NTU, and NTU responded with an apology. SSA subsequently received an additional complaint, and determined that the basis of the new complaint was a slightly altered version of the same brochure which NTU mailed after the cease-and-desist letter. The SSA Inspector General sent another letter to NTU, demanding that NTU provide written confirmation of its intent to comply with Section 1140 within ten days. Instead of complying, NTU filed a lawsuit in United States District Court, claiming that Section 1140 was unconstitutional.² While the action was pending, NTU mailed a third version of the brochure, which SSA also considered misleading and in violation of Section 1140.

The SSA Inspector General wrote NTU, stating that it planned to impose a penalty in the amount of \$274,582, or \$.50 per offending direct mail piece³ NTU requested a hearing in front of an ALJ, who found that NTU

2. The District Court ultimately dismissed NTU's complaint, and the Fourth Circuit affirmed.

3. The statute provides for a “civil money penalty not to exceed . . . \$5,000” for each piece of mail that contains the prohibited language. 42 U.S.C. § 1320b-10(b)(1).

Appendix A

violated both prongs of Section 1140. Specifically, the ALJ found that NTU knew that the language used in the brochures would induce recipients to read it because the language conveyed the false impression that the SSA authorized the mailing. Similarly, the ALJ found that recipients could reasonably interpret the language on the brochure as conveying the false impression that the SSA authorized the mailing. Finally, the ALJ found that the proposed penalty was reasonable. NTU appealed the ALJ's decision to the Appeals Board of the Department of Health and Human Services, which refused to review the decision, thereby adopting the ALJ's decision as final. NTU petitions this Court for review of the agency's final decision.

In its petition for review, NTU asserts several arguments. First, NTU challenges the constitutionality of Section 1140, arguing that it violates NTU's First Amendment rights as-applied, and that it is facially overbroad. Second, NTU argues that the monetary penalty imposed is "criminal in nature" and that it is "excessive" and prohibited by the Eighth Amendment. Finally, NTU urges this Court to apply *Daubert* principles to administrative proceedings and to strike the expert testimony from the ALJ proceeding.

*Appendix A***II. Discussion****A. First Amendment⁴****1. *As-Applied Challenge***

NTU first argues that Section 1140 violates the First Amendment as-applied because such application penalizes the organization's speech without finding "actual intent to defraud." In other words, according to NTU, government may not limit speech unless that speech intends to defraud or deceive the reader or listener. This assertion requires little analysis, because it is based on an incorrect reading of *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). Contrary to NTU's assertions, *Village of Schaumburg* acknowledged that a "direct and substantial limitation on protected activity" is constitutional if "it serves a sufficiently strong, subordinating interest." *Id.* at 636. Here, the government has a substantial interest in protecting Social Security recipients from deceptive mailings. For millions of Americans, Social Security is a vital, if not their only, source of income. Mail that appears to be from the SSA piques beneficiaries' interest and induces them to read and respond accordingly. Congress enacted Section 1140 to protect seniors and other beneficiaries from fraud, and to ensure that when the SSA sends legitimate mail to beneficiaries, the recipients will open it and not

4. We review NTU's constitutional claims de novo. See, e.g., *CBS Corp. v. FCC*, 535 F.3d 167, 174 (3d Cir.2008).

Appendix A

perceive it as "junk mail." House Comm. on Ways and Means, 102D Cong., Report on Deceptive Solicitations 5 (Comm. Print 1992). Section 1140 requires only that charities refrain from using deceptive language when soliciting. Therefore, Section 1140 is constitutional as applied because it serves a "strong, subordinating interest."

2. *Facially Overbroad*

Section 1140 regulates two types of conduct. The first type of conduct relates to the intentions of the speaker. This prong states that a speaker cannot use nineteen phrases, including "social security," "in a manner which such person knows or should know would convey . . . the false impression that such item is approved, endorsed or authorized by" SSA. 42 U.S.C. § 1320b-10(a). The second type of conduct is objective with regard to the reader, and prohibits the use of the proscribed phrases "in a manner which reasonably could be interpreted or construed as conveying the false impression that such item is approved, endorsed or authorized" by SSA. *Id.* Both prongs also cover communications that convey the false impression that the author has "some connection with the SSA." *Id.*

This Court has held that it will strike down a regulation of speech on its face "if its prohibitions are sufficiently overbroad—that is, if it reaches too much expression that is protected by the Constitution." *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir.2008). In other words, this Court must find that the very

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existence of the regulation at issue “will inhibit free expression to a *substantial* extent.” *Id.* (quotation marks omitted) (emphasis added); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246-44, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (invalidating the Child Pornography Prevention Act as facially overbroad because the statute reached a “substantial” amount of protected speech, such as speech that neither appealed to the prurient interest nor was patently offensive, including speech that had serious “literary, artistic, political, and scientific value”); *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (“[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”); 181 South Inc. v. Fischer, 454 F.3d 228, 235 (3d Cir.2006) (“The overbreadth claimant bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists.”).

In *United States v. Williams*, __ U.S. __, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008), the Supreme Court implied that it disfavors facial challenges, preferring to review circumstances under which the challenged statute actually infringes protected speech. The Court noted that the overbreadth doctrine tends “to summon forth an endless stream of fanciful hypotheticals” that may potentially implicate the infringement of protected speech. *Id.* at 1843. The Court further stated that the “‘mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.’” *Id.* at 1844

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(quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). The Court described hypothetical scenarios discussed at oral argument, and noted that if those situations came to pass, the affected parties could bring an as-applied challenge. *Id.*; see also *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, ___, 128 S.Ct. 1184, 1191, 170 L.Ed.2d 151 (“Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. . . . Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should not . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”).

As previously discussed, the first prong of Section 1140 prohibits the use of words such as “social security” in a manner that the speaker “knows or should know would convey” the false impression of government approval or endorsement. Like other forms of public deception, fraudulent charitable solicitation is unprotected speech. *Illinois v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 611-12, 123 S.Ct. 1829, 155 L.Ed.2d 793 (2003). Therefore, the prong of Section 1140 that contains the “knowing” standard is not unconstitutionally overbroad. Likewise, the First Amendment does not protect a speaker who uses the prohibited language in such a way that he or she “should know” that the message will mislead or deceive the reader.

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The second part of Section 1140 requires closer analysis because it does not require that the speaker “know” or “should know” that the language could mislead the reader. Rather, the second prong of the statute prohibits the use of the language in such a way that the reader could reasonably interpret as conveying governmental endorsement. Because this prong does not have a scienter requirement for the speaker, it could possibly reach some protected speech. However, it is wholly unclear that such non-deceptive speech reaches a “substantial” amount of protected speech. NTU has failed to provide any significant examples of protected speech falling under the statute and its counsel essentially disavowed the overbreadth claim at oral argument. Given the lack of evidence of the second prong’s “substantial” burden on protected speech, we find that the objective prong of Section 1140 is not overbroad.

We note that the Fourth Circuit has also examined a similar facial challenge to Section 1140 in *United Seniors Ass’n, Inc. v. Soc. Sec. Admin.*, 423 F.3d 397, 406-07 (4th Cir.2005). As in this case, the Fourth Circuit held that, while the objective prong of Section 1140 could reach some protected speech, any such speech constituted, “at most, a minuscule portion of the speech reached by the statute.” *Id.* at 407.

For these reasons, we reject NTU’s facial challenge.

*Appendix A***B. Monetary Fine⁵**

NTU next challenges the penalty imposed by the ALJ, arguing that it is criminal in nature and “excessive” in violation of the Eighth Amendment.

In *Myrie v. Comm'r, N.J. Dept. of Corr.*, this Court examined the issue of whether a surcharge at a prison commissary was civil or criminal in nature, and whether the surcharge was excessive. This Court explained that the first step in such an inquiry is to determine whether the legislature, “‘in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.’” 267 F.3d 251, 256 (3d Cir.2001) (quoting *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997)). This inquiry is clear, because Section 1040 expressly permits a “civil money penalty” for violation of the statute. 42 U.S.C. § 1320b-10(b) (emphasis added).

Under *Myrie*, the Court next examines whether the “statutory scheme [i]s so punitive either in purpose or effect . . . as to ‘transfor[m] what was clearly intended as a civil remedy into a criminal penalty.’” *Myrie*, 267 F.3d at 256 (quoting *Hudson*, 522 U.S. at 99-100) (internal citations omitted). This inquiry requires the Court to apply the seven criteria identified in *Kennedy*

5. An appellate court reviews the question of whether a fine is constitutionally excessive under a de novo standard. *United States v. Bajakajian*, 524 U.S. 321, 337 n. 10, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998).

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v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). These criteria include

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .

Id.

Applying these criteria to NTU's penalty of \$.50 per unit that violated Section 1140, we conclude that the criteria do not support NTU's contention that the penalty is criminal in nature. First, NTU concedes that the penalty does not involve an "affirmative disability or restraint." (App. Br. at 32.) Second, the Supreme Court has stated that monetary penalties have not "historically been viewed as punishment." *Hudson*, 522 U.S. at 104. Next, as discussed in Section II.A.2., *supra*, a violation of Section 1140 does not necessarily require a finding of scienter. Although Section 1140's monetary penalty likely promotes the traditional ends of punishment, retribution and deterrence, to some degree, that alone is not enough to characterize the

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penalty as penal in nature, rather than civil. *See id.* at 105 ("[T]he mere presence of [deterrence] is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals.") (internal citation and quotation marks omitted). In fact, one of the alternative purposes of the sanction is to reimburse the Social Security Trust Fund for the cost of policing deceptive practices. STAFF OF H.R. COMM. ON WAYS AND MEANS, 102D CONG., REPORT ON DECEPTIVE SOLICITATIONS, at 7 (Comm. Print 1992). In addition, Section 1140 is not consistent with criminal behavior, because a civil penalty reaches negligent conduct, whereas actual fraud is required for a crime. With regard to "whether an alternative purpose to which it may rationally be connected is assignable for it," this Court has interpreted this inquiry to ask "whether an asserted 'sanction' may be reasonably regarded as having a purpose other than punishment." *Myrie*, 267 F.3d at 261. As previously noted, the legislative history demonstrates that aside from punishment, there are the additional goals of deterrence, as well as funding the cost of enforcement of Section 1140. Staff of H.R. Comm. on Ways And Means, 102d Cong., Report on Deceptive Solicitations, at 9 (Comm. Print 1992). Finally, the fine at issue is not "excessive in relation to the alternative purpose assigned." When compared to the cost to the government to enforce Section 1140, the \$.50 per unit fine is not excessive. Moreover, it is far less than the maximum fine of \$5,000 per violation that the statute permits.

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Likewise, we find NTU's contention that the fine violates the Excessive Fines Clause of the Eighth Amendment meritless. To violate the Excessive Fines Clause, the fine must be both "excessive" and a "fine." *Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410, 420 (3d Cir.2000). For the reasons noted above, the penalty at issue is neither "excessive" nor a "fine," which more commonly refers to a penalty for a criminal offense. *Id.* (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989)).

C. Expert Testimony⁶

NTU asks this Court to endorse the application of *Daubert* to administrative proceedings and to strike the testimony of Professor William Arnold, the expert who testified for the government before the ALJ. *Daubert* sets forth rules for determining whether expert witnesses who testify in federal trials are reliable and relevant as required by the Federal Rules of Evidence. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Here, NTU argues that Professor Arnold's testimony was "sloppy and unscientific" and should have been excluded from the administrative hearing under *Daubert*. However, neither the Federal Rules of Evidence nor *Daubert* apply to administrative hearings. See, e.g.,

6. This Court will defer to fact determinations by the agency "if supported by substantial evidence on the record considered as a whole." 42 U.S.C. § 1320a-7a(e) (incorporated by reference in 42 U.S.C. § 1320b-10(c)(1)).

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20 C.F.R. § 498.217(b) (“[T]he ALJ will not be bound by the Federal Rules of Evidence, but *may* be guided by them in ruling on the admissibility of evidence.” (emphasis added)); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 n. 4 (9th Cir.2005) (explaining that *Daubert* does not govern the admissibility of evidence before an ALJ). *But see Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir.2004) (applying the “spirit of *Daubert*” to administrative proceedings).

We find NTU’s arguments without merit. Not only did the ALJ explain the Professor’s extensive credentials in her opinion, but she conceded that she did not rely on his testimony in reaching her decision. Specifically, the ALJ noted that “much of Professor Arnold’s testimony simply states the obvious. Interpreting the plain meaning of the language on such blatantly deceptive mailers does not require great expertise.” (App. at 17 n. 9.) Even without considering the testimony of Professor Arnold, we find that there is substantial evidence in the record to support the ALJ’s determination.

For the foregoing reasons, we will deny NTU’s petition.

**APPENDIX B — RECOMMENDED DECISION OF
THE DEPARTMENT OF HEALTH AND HUMAN
SERVICES, DEPARTMENTAL APPEALS BOARD,
APPELLATE DIVISION DATED APRIL 17, 2007**

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:

Social Security Administration
Office of the Inspector General,

Petitioner,

- v. -

National Taxpayers Union,

Respondent.

**RECOMMENDED DECISION DECLINING
REVIEW OF ADMINISTRATIVE LAW
JUDGE DECISION**

The National Taxpayers Union (NTU) appealed a December 14, 2006 decision by Administrative Law Judge (ALJ) Carolyn Cozad Hughes, *Social Security Administration v. National Taxpayers Union*, DAB CR1543 (2006). In that decision, the ALJ: (1) found that NTU had mailed correspondence that used the words “social security” in a manner that violated section 1140 of the Social Security Act (Act); and (2) affirmed the

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\$274,584 civil money penalty proposed by the Social Security Administration's Office of Inspector General for NTU's violations of section 1140.

The regulations governing appeals to the Board in administrative proceedings to enforce section 1140 provide that the Board "will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained an error of law." 20 C.F.R. § 498.221(i). The Board may remand a case to the ALJ for further proceedings or may issue to the Commissioner of Social Security a recommended decision to decline review or affirm, increase, reduce, or reverse the penalty determined by the ALJ. 20 C.F.R. § 498.221(h).

The Board has considered each of the contentions made by NTU in the brief accompanying its January 11, 2007 notice of appeal and examined the record. Applying the appropriate standard of review, the Board finds no basis to disturb the ALJ's factual findings or legal conclusions on any issue. Consequently, the Board issues this recommended decision to decline review of the ALJ's December 14, 2006 decision.

This recommended decision becomes the final decision of the Commissioner 60 days after the date on which it is served on the parties and the Commissioner, *unless* the Commissioner reverses or modifies the recommended decision within that 60-day period. 20 C.F.R. § 498.222(a). If the Commissioner does not reverse or modify the recommended decision, the Board

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will serve a copy of the Commissioner's final decision on the parties. If the Commissioner reverses or modifies the recommended decision, the Commissioner shall serve NTU with a copy of his final decision.

Appeal Rights

NTU may appeal the final decision of the Commissioner by filing a petition for judicial review in the appropriate United States Court of Appeals. *See* Act §§ 1140(c)(1), 1128A(e). The petition for judicial review must be filed within 60 days after NTU is served with a copy of the Commissioner's final decision. 20 C.F.R. § 498.222(c)(1). If a petition for judicial review is filed, a copy of the filed petition must be sent by certified mail, return receipt requested, to the Social Security Administration's General Counsel at the following address:

Social Security Administration Office
of General Counsel
Altmeyer Building
6401 Security Boulevard, Room 635
Baltimore, MD 21235.

See 20 C.F.R. § 498.222(c)(2).

s/ Judith A. Ballard
Judith A. Ballard

s/ Leslie A. Sussan
Leslie A. Sussan

s/ Donald F. Garrett
Donald F. Garrett
Presiding Board Member

**APPENDIX C — DECISION OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES, DEPART-
MENTAL APPEALS BOARD, CIVIL REMEDIES
DIVISION DATED DECEMBER 14, 2006**

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:

Social Security Administration,

Petitioner,

- v. -

National Taxpayers Union,

Respondent.

DECISION

The Respondent, National Taxpayers Union (NTU), is an advocacy group with headquarters in Alexandria, Virginia. In order to increase membership and raise money, NTU regularly sends out solicitations and other mailers. Here, because it persisted in sending mailers asserting (among other claims deemed misleading): “*OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY*,” the Inspector General (I.G.) of the Social Security Administration (SSA) proposes imposing against it a \$274,582 civil money penalty (CMP) under section 1140 of the Social Security Act (Act). For the reasons set forth below, I agree with SSA and impose against NTU a CMP of \$274,582.

*Appendix C***I. Background**

In February 2002, a United States Senator forwarded to SSA a constituent complaint about a letter and survey that NTU sent him.¹ P. Ex. 3. The matter was referred to the I.G. who, in a letter dated April 3, 2002, advised NTU of the complaint and of the I.G.'s determination that the mailing violated section 1140 of the Act because its language could reasonably be construed as conveying the impression that NTU was conducting a survey authorized by SSA. In fact, SSA had not endorsed, approved, or authorized NTU to conduct such a survey on its behalf. The I.G.'s letter asked that, in all its direct mailings and other communications, NTU immediately cease and desist from using the words "Social Security" or "Social Security Administration" in a manner that could reasonably be construed as conveying the false impression that the communication was authorized, approved, or endorsed by SSA. P. Ex. 5.

NTU's president, John Berthoud, responded in a letter dated April 12, 2002, apologizing for any unintended appearance of impropriety. The letter explained that NTU intended to use the survey results "in lobbying the government, Congress, and the Social Security Administration for much-needed changes (which was our purpose for commissioning it)," and promised to change the package design "so that there is no impression that

1. We refer to this mailing as "Version 1." An original example of Version 1 is in the record as R. Ex. 1. *See also* P. Ex. 17.

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the SSA has provided any formal authorization for our project."² P. Ex. 6; Stipulation; Tr. 2-3.

On September 4, 2002, however, SSA received another complaint about an NTU mailing similar to the one that generated the first complaint. P. Exs. 9, 11. After verifying that this new version of NTU's mailing was developed and mailed after NTU promised to change its package design (P. Ex. 10), the I.G. determined that the revised mailing also misled the public into believing that the survey was authorized, endorsed, or approved by SSA.³ In a letter dated November 7, 2002, the I.G. demanded that, within 10 days of its receipt of the letter, NTU provide written confirmation of its plan to comply

2. President Berthoud's statement could be construed as misleading. NTU neither solicited the survey nor used its results for any purpose. NTU's Membership Director, Douglas Frank, hired a copywriter, D. Richard Geske, to design a mailing for the purpose of increasing membership and raising money. The copywriter decided that the survey would be an effective response device or "involvement technique." Tr. 11; 252. The survey itself was not a valid survey, by any objective standard. Tr. 131-32. The survey "results" have never been used. They were not tabulated until March 2003, and were not shared with the NTU Board. Tr. 10, 17, 43, 48 ("Actually, no particular plan of operation for [tabulating survey results]."). When tabulated, the results were not particularly supportive of NTU's position—a fact NTU seems to have ignored. R. Ex. 10. NTU's then Director of Government Affairs, Alfred W. Cors, Jr., was not even aware of the survey, and opined that it was designed more to raise money for NTU than to lobby Congress. Tr. 109-11.

3. This revised mailing is referred to as Version 2, and an original example is in the record as R. Ex. 2. *See also* P. Ex. 18.

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with section 1140. The letter warned that, if NTU failed to act, the I.G. would take administrative action under section 1140 and its implementing regulations. P. Ex. 11.

NTU declined to submit the requested plan. Instead, characterizing section 1140 as unconstitutional, on December 6, 2002, NTU filed a law suit against SSA in U.S. District Court for the District of Maryland. P. Ex. 12; *see* SSA's post-hearing brief (SSA Br.), Appendix A. In January and February 2003, while the court action was pending, NTU mailed out a third version of its solicitation/survey, which SSA also considers misleading and violative of section 1140. P. Exs. 14, 16, 19.⁴

The District Court subsequently dismissed NTU's complaint. *National Taxpayers Union v. SSA*, Civil Action No. WMN-02-3949 (September 3, 2003) (SSA Br., Appendix A). NTU appealed, and, in a decision dated July 15, 2004, the U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal. *National Taxpayers Union v. SSA*, 376 F.3d 239 (4th Cir. 2004), *cert. den.* 125 S.Ct. 1300 (2005).

Shortly thereafter, in a letter dated May 10, 2005, the I.G. proposed imposing against NTU a CMP in the amount of \$274,582 (or 50¢ per violation), based on its determination that, between December 2001 and February 2003, NTU mailed 549,164 solicitation surveys

4. Referred to as Version 3, an original example of the mailing is in the record as R. Ex. 3. *See also* P. Ex. 19.

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that violated section 1140. The letter advised NTU of its appeal rights and NTU timely requested a hearing.

I held a hearing in Washington, D.C. on July 12 and 13, 2006. I have admitted into evidence SSA Exhibits (P. Exs.) 1-37, and NTU Exhibits (R. Exs.) 1-19, and 24-51. Tr. 2, 247. Following the hearing, the parties submitted post-hearing briefs (SSA Br. and NTU Br.) and reply briefs (SSA Reply and NTU Reply).

II. Statutory and Regulatory Background

Section 1140 of the Act prohibits misuse of symbols, emblems, or names in reference to Social Security or Medicare.

(a)(1) No person may use, in connection with any item constituting an advertisement, solicitation, circular, book, pamphlet, or other communication . . . alone or with other words, letters, symbols or emblems—

(A) the words "Social Security", "Social Security Account", "Social Security System", "Social Security Administration", "Medicare", "Health Care Financing Administration"⁵, "Department of Health and Human Services", "Health and Human

5. Citation to the Health Care Financing Administration (HCFA) at section 1140 has been changed to the Centers for Medicare & Medicaid Services (CMS). P.L. 108-173, § 900(e).

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Services", "Supplemental Security Income Program", or "Medicaid", the letters "SSA", "HCFA", "DHHS", "HHS", or "SSI", or any other combination or variation of such words or letters, or

(B) a symbol or emblem of the Social Security Administration, Health Care Financing Administration, or Department of Health and Human Services (including the design of, or a reasonable facsimile of the design of . . . envelopes or other stationery used by the Social Security Administration, Health Care Financing Administration, or Department of Health and Human Services) or any other combination or variation of such symbols or emblems,

in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed, or authorized by the Social Security Administration, the Health Care Financing Administration, or the Department of Health and Human Services or that such person has some connection with, or authorization from, the Social Security Administration, the Health Care Financing Administration, or the Department of Health and Human Services.

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(3) Any determination of whether the use of one or more words, letters, symbols, or emblems (or any combination or variation thereof) in connection with an item described in paragraph (1) . . . is a violation of this subsection shall be made without regard to any inclusion in such item (or any so reproduced, reprinted, or distributed copy thereof) of a disclaimer of affiliation with the United States Government or any particular agency or instrumentality thereof.

The Act provides for CMPs of up to \$5,000 *per violation*. Act, § 1140(b). Each piece of mail containing "one or more words, letters, symbols, or emblems in violation of subsection (a)" constitutes a separate violation.

Implementing regulations are found at 20 C.F.R. Part 498. Echoing the broad statutory language, they authorize the I.G. to impose a penalty against any person who, he determines,

has made use of certain Social Security program words, letters, symbols, or emblems in such a manner that they knew or should have known would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that an advertisement or other item was authorized, approved, or endorsed by the Social Security Administration, or that such person has some connection with, or

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authorization from, the Social Security Administration.

20 C.F.R. § 498.102(b). CMPs maybe imposed for misuse of the statutorily protected words, letters, symbols, or emblems, "or any other combination or variation" of those words, letters, symbols or emblems. 20 C.F.R. § 498.102(b)(1). Again, the use of a disclaimer is not considered a defense in determining a section 1140 violation. 20 C.F.R. § 498.102(c).

With respect to the amount of the penalty, the regulations authorize the I.G. to impose a penalty of not more than \$5,000 for each violation. In the case of a direct mailing solicitation, each separate piece of mail containing one or more program words, letters, symbols, or emblems constitutes a separate violation. 20 C.F.R. § 498.103. In determining the amount of the CMP, the I.G. takes into account: (1) the nature and objective of the advertisement, solicitation, or other communication, and the circumstances under which they were presented; (2) the frequency and scope of the violation and whether a specific segment of the population was targeted; (3) the prior history of the individual, organization, or entity in their willingness or refusal to comply with informal requests to correct violations; (4) the history of prior offenses of the individual, organization, or entity in their misuse of program words, letters, symbols, and emblems; (5) the financial condition of the individual or entity; and (6) such other matters as justice may require. The use of a disclaimer of affiliation with the U.S. government, SSA, or its programs is not a mitigating factor in determining the amount of penalty. 20 C.F.R. § 498.106.

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If the I.G. seeks to impose a penalty, it serves the party with written notice of its intent. 20 C.F.R. § 498.109. The party is entitled to a hearing before an administrative law judge (ALJ). 20 C.F.R. § 498.202. The hearing is not limited to specific items and information set forth in the notice letter; additional items or information may be introduced by either party, subject to the 15-day exchange requirements of 20 C.F.R. § 498.208. 20 C.F.R. § 498.215(e).

NTU has the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances. The I.G. has the burden of going forward and the burden of persuasion with respect to all other issues. The burden of persuasion "will be judged by a preponderance of the evidence." 20 C.F.R. § 498.215(b) and (c).

The regulations require me to issue an initial decision based on the record, and specifically grants me the authority to affirm, deny, increase, or reduce the penalties proposed by the I.G. 20 C.F.R. § 498.220.

III. Issues

I must determine whether the three solicitations sent by NTU violate section 1140 of the Act. Specifically, (1) Did NTU know, or should it have known, that its solicitations conveyed the false impression that its mailings were approved, endorsed, or authorized by SSA or that NTU had some connection with or authorization from the agency?

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In the alternative, (2) Could the solicitations reasonably be interpreted or construed as conveying the false impression that they were approved, endorsed, or authorized by SSA or that NTU had some connection with or authorization from the agency? If I find in the affirmative on either of these questions, NTU has violated the statute and is subject to the imposition of a CMP.

(3) If I conclude that NTU has violated section 1140, what, if any, CMP should be imposed?

IV. Discussion

NTU relies on direct mail solicitations "to help" build and maintain grass roots support." R. Ex. 9, at 5. According to NTU's then Membership Director, Douglas Frank, in June 2001, NTU decided to use the issue of private investment accounts for Social Security in its effort to increase membership and raise funds. R. Ex. 17, at 1 (Frank Decl. ¶¶ 1, 2), Tr. 6. He directed D. Richard Geske, an independent copywriter, to put together a solicitation package that addressed the issue. He gave no specific directions, leaving the choice of "response device" up to the copywriter. R. Ex. 17, at 1 (Frank Decl. ¶ 3); Tr. 7. He did not ask Copywriter Geske to design a survey. Tr. 7-8, 11; R. Ex. 15, at 1-2 (Geske Decl. ¶ 13). On his own initiative, Copywriter Geske decided to include a survey in the package. R. Ex. 15, at 3 (Geske Decl. ¶ 16).

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All of the mailers are “self-mailers;” the entire package is one piece of paper that “comes open in the reader’s hands, but the parts stay together until used.” R. Ex. 15, at 2 (Geske Decl. ¶ 4); R. Ex. 17, at 1-2 (Frank Decl. ¶ 3).

A. *In all three versions of its “Social Security” solicitation, NTU violated section 1140 of the Act.⁶*

1. NTU used the words “Social Security” on its solicitations in a manner that could reasonably be interpreted as conveying the false impression that its mailings were approved, endorsed, or authorized by the Social Security Administration, or that NTU had some connection with or authorization from SSA.

NTU argues that a “reasonable person” could see that its mailers originated from NTU, and not from SSA or any other government agency. But this is not the statutory standard. The baseline inquiry under section 1140(a)(1) is whether NTU’s mailers reasonably could be interpreted or construed to have conveyed the false impression that SSA *approved, endorsed, or authorized* their contents. Further, the statute does not require any evidence of actual confusion by those who received the mailers. As the Court of Appeals for the Fourth Circuit

6. I make findings of fact and conclusions of law to support my decision in this case. I set forth each finding below, in *italics* and **bold**, as a separate lettered or numbered heading.

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has acknowledged, this test creates a “relatively low threshold to support a finding of liability.” *United Seniors Association v. SSA*, 423 F.3d 397, 405 (4th Cir. 2005).

Here, although NTU’s mailers do not purport to be *from* SSA itself, they are simply chock-full of language that conveys the impression that SSA *approved*, *authorized*, or *endorsed* their contents. I consider below some of the more egregious examples:

Version 1.

- Written on the outside of the Version 1 mailer, in underlined bright red capital letters, is the following: ***OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY.***⁷ Immediately beneath that, in smaller capital letters, the following appears:

**COMMISSIONED BY THE NATIONAL
TAXPAYERS UNION FOR THE SOCIAL
SECURITY ADMINISTRATION, WHITE
HOUSE AND CONGRESS OF THE UNITED
STATES**

7. In *United Seniors*, the Court observed that mass mailers purposely use bold red ink for the “Social Security message” and black ink for the sender block “to detract attention from the sender block and focus attention on the Social Security message.” *United Seniors Association*, 423 F.3d 401. Copywriter Geske conceded that he wanted “to bring attention to this particular piece.”

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(Emphasis in original).⁸ P. Ex. 17, at 1; R. Ex. 1. I find this language, by itself, sufficient to establish a section 1140 violation since it creates the impression that NTU's survey has official sanction. Even though it shows that NTU sent the mailer, the recipient would still reasonably think that SSA approved, endorsed, or authorized its contents. *See United Seniors Association*, 423 F.3d at 405. The reader is led to believe that NTU is acting with "official" sanction from three governmental entities. *See also* P. Ex. 37, at 2 (Arnold Decl.); Tr. 147-48.

In enacting section 1140, Congress was particularly concerned that direct mailers put "Social Security" words and symbols on the face of their mailers to entice recipients into opening them. As the Court of Appeals noted, once a recipient of a misleading envelope opens the envelope and begins reading its contents, the deceptive "communication" has served its purpose. *United Seniors Association*, 423 F.3d at 404. NTU has made much of what I consider an inconsequential distinction between the outside of a self-mailer and an envelope. For all practical purposes, the information printed on the outside of these self-mailers has the same impact as information printed on the outside of an envelope, and, as with an envelope, once the recipient opens the self-mailer, the deceptive communication has achieved its purpose.

8. To the extent possible, quotations from the mailers are presented in their original format, including capitalization, italics, underlining, and bold text.

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- The outside of the mailer is filled with additional language designed to create the impression of some official sanction:

POSTMASTER: IMMEDIATE DELIVERY
REQUESTED DELIVER IN ACCORDANCE
WITH POSTAL REGULATIONS:
DMM300.1.0

CERTIFIED SURVEY ENCLOSED:

P020041B 03204 16282

***PLEASE OPEN IMMEDIATELY AND
KINDLY RESPOND AS SOON AS POSSIBLE***

(Emphasis in original). P. Ex. 17, at 1. Director Frank acknowledged that the mailer was simply sent at the third class, non-profit rate, and that nobody "certified" the survey. Tr. 62. Even Copywriter Ceske eventually conceded that this language is there to "increase the importance of a piece." Tr. 283, 284.

William E. Arnold, Ph.D, is a Professor Emeritus in Communications at Arizona State University, and a Professor of Gerontology at the University of Arizona. He has conducted research on the use of information to change attitudes and behavior. P. Ex. 37, at 16 *et seq.* (Arnold Decl.); Tr. 121-22. He has extensive experience in conducting surveys, and testified credibly during these proceedings. Tr. 130. Professor Arnold points out that, taken together, the language on the outside of the mailer conveys a sense of urgency that a Social Security

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beneficiary would be reluctant to ignore. Even non-beneficiaries could reasonably infer that the mailing contains official documents that could affect personal earnings records maintained by SSA. P. Ex. 37, at 3 (Arnold Decl.).⁹

- When the flyer is opened, it leads to a page with the "National Taxpayers Union" letterhead, below which the violative language is repeated, in bold, underlined capital letters:

9. NTU attacks Professor Arnold's expertise, pointing out that the professor admitted that he is not an expert on direct mail tactics. NTU Br. at 8; Tr. 146. I see no reason why he would need such expertise in order to opine knowledgeably in this case. Professor Arnold's expertise in communications is undeniable; he has spent forty years researching, publishing and teaching in that field. He understands the significance of language and is fully qualified to comment on how people might reasonably construe particular words and phrases. Moreover, much of his testimony simply states the obvious. Interpreting the plain meaning of the language on such blatantly deceptive mailers does not require great expertise. Even NTU, although denying the section 1140 violation, concedes that its use of language "might abuse the recipient." NTU Br. at 4 n.6.

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**OFFICIAL NATIONAL SURVEY ON
SOCIAL SECURITY**

CONDUCTED BY
THE NATIONAL TAXPAYERS UNION
108 NORTH ALFRED STREET
ALEXANDRIA, VIRGINIA 22314

AND COMMISSIONED FOR

THE SOCIAL SECURITY ADMINISTRATION
THE WHITE HOUSE
UNITED STATES HOUSE OF
REPRESENTATIVES
UNITED STATES SENATE

(Emphasis in original). P. Ex. 17, at 3. The page then addresses the recipient by name (**ISSUED TO:** [name deleted]), followed by what appears to be very specific identifying information (**QUALIFYING ZONE & RATING; CERTIFICATION NUMBER, and RETURN DATE**). But this identifying information is, in fact, of absolutely no consequence except to create the impression of consequence.

Following that language, in underlined, red capital letters is the "**IMPORT INFORMATION**" section. The recipient is again mentioned by name (in fact, the recipient's name is repeated throughout the mailer) and told:

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YOUR NAME WAS SPECIFICALLY CHOSEN
to receive this **OFFICIAL SURVEY ON**
SOCIAL SECURITY...

... Because you have a **VALID SOCIAL SECURITY NUMBER** and live in one of the **QUALIFYING ZONES** from which *we are required* to select at least **ONE** participant.

(The ellipses are in the original; emphasis is also in the original). Then the mailing tells the recipient (again by name) that the recipient's participation in the survey is *crucial*.

And because you or your spouse has paid into the Social Security system and are receiving or expect to receive benefits in the future. . . .

P. Ex. 17, at 3; R. Ex. 1.

In reviewing this language, Professor Arnold observed that "the recipient's logical conclusion is that SSA has shared official information with NTU, information that only SSA would be privy to, in order for NTU to conduct an official survey on SSA's behalf." P. Ex. 37, at 3-5 (Arnold Decl.). I agree. The references to the recipient's social security number and eligibility create the impression that NTU has specific information that it could only have obtained from SSA. As one recipient of

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an NTU mailer (and of Social Security)¹⁰ explained to NTU's private investigator,

Ms. Fischer: Because in there someplace it says something about people collecting, if I remember correctly.

Mr. Roche: Collecting Social Security?

Ms. Fischer: Yes. I didn't know how they would have possibly found that out.

* * *

Ms. Fischer: It seemed to me that they knew that I was collecting — somehow they got my Social Security number, which is supposed to be private. Nobody is supposed to know that.

Mr. Roche: Right.

Ms. Fischer: Otherwise they wouldn't have known my birthday or my — the fact that I was collecting —

Tr. 233-34.

Further, I agree with the I.G. that the assertion that NTU is *required* to select at least one participant from each "qualifying zone" tells the recipient that NTU is not conducting the survey for itself, but is acting at the

10. As discussed *infra*, Laura Fischer received Version 2 of the mailer, which contains this same language.

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direction of others who have imposed this requirement. Inasmuch as no other entities are mentioned, logic dictates that SSA, the White House, and/or Congress imposed that requirement.

- On page 4 of the mailing, under the bold red caption "*WHAT ARE THE OPTIONS? CAN SOCIAL SECURITY BE SAVED?*", the mailer describes NTU "[a]s the authorized sponsor of this survey and a credible voice in Washington, D.C. that has exclusively represented the interests of the American taxpayer. . . ."

(Emphasis in original); P. Ex. 17, at 6; R. Ex. 1. Director Frank defended this language by asserting that NTU was the "authorized sponsor" because it authorized itself to conduct the survey. Tr. 61. And Copywriter Geske insisted that if the recipient "read the entire package" he/she would "understand very clearly that it was the National Taxpayers Union." Tr. 287. But no one would reasonably infer that NTU required authorization from itself to sponsor a survey. "Authorization" suggests approval by an outside entity with some authority, and, again, according to the mailer, SSA, the White House, and Congress are the authorizing entities.

The mailer then includes the inevitable, and repeated, requests for donations, along with the ersatz survey. P. Ex. 17, at 8, 10; R. Ex. 1 ("[Name deleted] thank you for your valued participation in this important survey on Social Security. Please return your survey today in the envelope provided and won't you please do your part to help the National Taxpayers Union save Social Security by enclosing your donation of \$25 or more. . . ."). Tr. 14-16.

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Version 2.

Director Frank responded to the I.G.'s cease-and-desist letter by removing from the mailer the most conspicuous references to the "Social Security Administration." Tr. 19-20. The revised mailer still purports to contain an "**OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY**" that was "**COMMISSIONED BY THE NATIONAL TAXPAYERS UNION FOR THE WHITE HOUSE AND CONGRESS OF THE UNITED STATES.**" (Emphasis in original). P. Ex. 18, at 1; R. Ex. 2. The mailer contains the same specific, faux-consequential identifying information. The recipient is addressed by name and advised that her name was "**SPECIFICALLY CHOSEN**" to receive this **OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY** because she lives in a "**QUALIFYING ZONE**" from which NTU is "*required*" to select a participant and she is the "**ONLY** individual from a total of 89" in the above "**QUALIFYING ZONE**" whose name matches the other "important demographic and economic data that's central to the purpose of this survey." P. Ex. 18, at 3; R. Ex. 2.¹¹ It still refers to the recipient's Social Security eligibility, and refers to NTU as the "authorized sponsor" of the survey. P. Ex. 18, at 6; R. Ex. 2.

I do not find that eliminating "Social Security Administration" from the listed "survey sponsors"

11. Copywriter Geske would not admit that this "one of 89" number was a fabrication, but he could not explain why the remaining 88 names would not have qualified, nor why recipients from various zones were all "one of 89." Tr. 270-77.

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brought the mailer into compliance with section 1140. The mailer continued to use the term "Social Security" as "part of an overall design" that conveys the impression that the mailer contains an important Social Security document (the survey) sent on behalf of official government sources. This violates section 1140. *See United Seniors Association*, 423 F.3d 405.

Laura Fischer is a retiree receiving Social Security benefits. P. Ex. 34, at 1 (Fischer Decl. ¶ 1). She has had no association with NTU, but a copy of Version 2 was mailed to her in about June 2002. *Id.* at 2 (Fischer Decl. ¶¶ 4, 5). She testified, credibly, that she does not generally open such solicitations, but she opened this one because of the bold red reference to Social Security and because it indicated that a "certified survey" was enclosed. *Id.* at 2 (Fischer Decl. IT 4). Tr. 80, 227-28, 235. At first she thought that SSA was involved with NTU's request, but, having worked for SSA in the distant past, she considered it unlikely that SSA would sponsor a private solicitation for funds. So she called SSA to inquire. *Id.* Thus, the I.G. has not only shown that NTU's mailing "could be interpreted" as conveying a false impression (satisfying the "low threshold" set by the statute), but has also shown that the mailing in fact confused its recipient, enticing her to open it, read its contents, and call SSA. Had the envelope not referred to SSA, she would have discarded it, unopened.¹²

12. Ms. Fischer's inclination to discard such mail illustrates Congress' additional concern about the effect of deceptive (Cont'd)

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12. Ms. Fischer's inclination to discard such mail illustrates Congress' additional concern about the effect of deceptive (Cont'd)

*Appendix C**Version 3.*

After receiving the LG.'s November 7, 2002 cease-and-desist letter, NTU mailed out a third version of the solicitation/survey. P. Ex. 19, at 1; R. Ex. 3.

- Written on the outside of Version 3, in even larger underlined bright red capital letters is: "***OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY***." As in Version 2, immediately beneath that, in smaller capital letters, is "**COMMISSIONED BY THE NATIONAL TAXPAYERS UNION FOR WHITE HOUSE AND CONGRESS OF THE UNITED STATES.**"

(Emphasis in original).

- Again, when the flyer is opened, it leads to a page with the NTU logo and **NATIONAL TAXPAYERS UNION** in bold letters.

Immediately below that, in red, capitalized italics, is: ***REQUIRED NOTIFICATION AND DISCLAIMER:***

(Cont'd)

mailers. People are so inundated with "official" mail that they are not able to distinguish genuine correspondence from SSA, and are more likely to discard it, seriously hampering SSA's ability to communicate with its constituents. *United Seniors Association*, 423 F.3d at 399. See also *SSA v. United Seniors Association*, DAB CR1075, at 4-5 (2003); House Comm. on Ways and Means, 102d Cong., 2d Sess., Report on Deceptive Solicitations 5 (Comm. Print 1992).

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Then, in capital letters: THE NATIONAL TAXPAYERS UNION IS LEGALLY RECOGNIZED AND REGISTERED AS A NOT FOR PROFIT ORGANIZATION BY THE UNITED STATES GOVERNMENT. THIS ORGANIZATION IS INDEPENDENT FROM SAID GOVERNMENT AND RECEIVES NO FUNDING OR SUPPORT OF ANY KIND BY THE U.S. GOVERNMENT, ITS AGENCIES OR ANY OF THE BRANCHES THEREOF. MOREOVER, THE ENCLOSED **OFFICIAL NATIONWIDE OPINION POLL ON SOCIAL SECURITY IS SPONSORED BY SAID ORGANIZATION TO INSURE THAT CERTAIN VIEWPOINTS HELD BY THE GENERAL PUBLIC ARE FAIRLY AND ACCURATELY REPRESENTED.**

(Emphasis in original). P. Ex. 19, at 3; R. Ex. 3. Even if this were a credible disclaimer, the statute explicitly precludes me from considering a disclaimer in determining a violation under section 1140. Determination of a violation "shall be made without regard to any inclusion in such item . . . of a disclaimer of affiliation with the United States Government or any particular agency or instrumentality thereof." Act, § 1140(a)(3).

Moreover, the disclaimer paragraph is more an exercise in obfuscation than a legitimate disclaimer. First, NTU claims legal recognition and registration by the U.S. government, which suggests some official government sanction beyond that afforded a typical non-profit

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organization. The next sentence, though, disavows any financial connection with the government. Then comes the reference, in bold, to the **OFFICIAL NATIONWIDE OPINION POLL ON SOCIAL SECURITY**, sponsored, not by NTU, but by "said organization." The antecedent for "said organization" is ambiguous. Careful parsing of the passage suggests that it refers to NTU, but the more casual reader could easily conclude that it refers to SSA, or some other government agency or branch. *See P. Ex. 37, at 10-11 (Arnold Decl.)*

- The next paragraph confuses the reader even more, suggesting that NTU's poll has been sponsored or endorsed by both the legislative and executive branches of government, or, as SSA argues, that NTU is working with the President and Congress to conduct the survey. It reads:
ACKNOWLEDGMENT: IT IS FURTHERMORE HEREIN ACKNOWLEDGED THAT SAID OFFICIAL NATIONWIDE POLL ON SOCIAL SECURITY HEREIN CONTAINED WAS COMMISSIONED FOR THE PRESIDENT OF THE UNITED STATES, THE HONORABLE GEORGE WALKER BUSH, AND MEMBERS OF THE UNITED STATES CONGRESS.
- The next section repeatedly addresses the recipient by name, advises her that the branches of government are formulating new policies for the "**SOCIAL SECURITY PROGRAM**," that will have a "*profound effect*" on her retirement benefits, eligibility requirements, and the manner in which

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the program is administered. The mailer tells her that her views "will influence those policies and changes" but that she "**MUST PARTICIPATE** by **filling-out and returning the *Official Nationwide Opinion Poll on Social Security***." The letter then repeats that she was selected because of her "eligibility status."

Again the reference to the recipient's eligibility status suggests that NTU obtained confidential infatuation from SSA about this particular recipient. The admonition that she "must participate" suggests that her failure to do so could adversely affect her receipt of benefits. *See* P. Ex. 37, at 12 (Arnold Decl.).

NTU argues that I should require "a properly designed survey to establish whether the recipient class (the reasonable person) would understand the NTU solicitations to be government-sponsored." NTU Br. at 7. Of course, at approximately \$ 100,000 per survey, such a requirement would render section 1140 virtually unenforceable. *See* Tr. 155. While such a survey might be admissible as evidence, and NTU was certainly free to conduct and submit the results of such a survey, nothing in the statutory language, regulations, nor case law suggests that SSA must do so in order to halt the blatant misuse of protected words and symbols. Indeed, the reviewing courts have unanimously affirmed the ALB's authority to determine violations without such evidence. *United Seniors*, 423 F.3d 397; *SSA v. National Federation of Retired Persons*, DAB No. 1885 (2003), *aff'd*, 115 Fed.Appx. 763, 2004 WL 2980374 (C.A.5).

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Moreover, this argument — that a survey would show that no one could reasonably interpret the mailer as conveying a false impression of government involvement — would be in the nature of an affirmative defense, for which respondent bears the burden of going forward and the burden of persuasion. 20 C.F.R. § 498.215(b)(1). I note also that NTU has exclusive control over the recipient information necessary to conduct such a survey, information it did not share with the I.G., even in response to subpoenas (see SSA Reply at 11; Tr. 39-41), and was thus the only party in a position to undertake such a survey.

All three versions of NTU's Social Security mailer were designed to entice the recipient to open it, to send in a response, and to send money. Tr. 141. To achieve these purposes, the mailers are fraught with deliberately ambiguous and deceptive language that repeatedly includes the protected "Social Security" words. By any objective standard, NTU's use of those protected words conveyed the false impression that the mailers' contents were approved, endorsed, or authorized by SSA. The language used in the mailers also suggested that NTU had some connection with or authorization from SSA. The I.G. has thus established that NTU violated section 1140, without regard to what NTU knew or should have known about how its mailing would be interpreted. I next consider what NTU knew or should have known.

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2. *NTU knew or should have known that its solicitations conveyed or could reasonably have been interpreted as conveying the false impression that its mailings were approved, endorsed, or authorized by SSA, or that NTU had some connection with or authorization from that agency.*

In *SSA v. United Seniors*, Judge Kessel wrote:

Respondent is a sophisticated mass marketer of ideas. Its life blood is its appeals to senior citizens on a range of social and policy issues. It has vast experience in making mass mailings. That sophistication makes it obvious that Respondent knew what it was doing when it designed the envelopes that are at issue in this case.

United Seniors, DAB CR1075, at 13 (2003), *aff'd* 423 F.3d 397 (4th Cir. 2005); *see also National Federation of Retired Persons*, DAB No. 1885, at 23, 28, *aff'd*, 115 Fed.Appx. 763, 2004 WL 2980374 (where Respondent deliberately and prominently displayed protected language on the outside of its mailings to induce recipients to open them, and where it used protected language on the inside to induce recipients to respond, it not only knew or should have known that its mailing created a false impression, it specifically designed those mailers to create that impression).

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Judge Kessel's words also apply to NTU; it is an experienced mass marketer of ideas that knew exactly what it was doing when it designed the mailers in this case. Richard Geske is an experienced copywriter, well-versed in direct mail techniques.¹³ He carefully and

13. Copywriter Geske was not a particularly credible witness. He attempted to circumvent even simple questions, and, at times, his spirited defense of NTU's actions bordered on the absurd. For example, notwithstanding the names of three governmental bodies on the outside of the mailer, Copywriter Geske refused to acknowledge that the envelope contained any reference to the government:

Q. Do you see how it says, "Commissioned by the National Taxpayers Union for the Social Security Administration, White House and Congress of the United States"?

A. Yes.

Q. Okay, why did you make that reference to the government?

A. Well, it's not a reference to the government, in my opinion . . .

JUDGE HUGHES: Do you understand that the Social Security Administration is a government agency?

THE WITNESS: Yes, I do.

JUDGE HUGHES: And the White House is a government entity?

THE WITNESS: Right.

JUDGE HUGHES: As is the Congress of the United States?

THE WITNESS: Yes.

(Cont'd)

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deliberately chose the mailer language. He put on the outside of the mailer "**OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY.**" He acknowledges that he chose this language "to get attention."

The object of the text on the exterior of the mailer is to get attention. In writing a mailer like this, there is a risk that recipients will see it as "junk mail" and throw it away, and the use of bold lettering and messages on the exterior is designed to encapsulate the entire message so the recipient may decide quickly that it is worthwhile to read further.¹⁴

(Cont'd)

JUDGE HUGHES: Okay, so it is a reference. I think we can all agree that this is a reference to the government.

THE WITNESS: Well, actually, I think it's abundantly clear. It means that — exactly what it says. Here is a survey. The National Taxpayers Union is conducting this survey. And they had the authority to do this task — hence the word "commissioned" — for the Social Security Administration, blah, blah, blah.

Tr. 260-62.

14. NTU has argued that its mailers so resembled "junk mail" that no reasonable person would have considered it anything else. Copywriter Geske's testimony here — that he designed the outside of the mailer to distinguish it from "junk mail" so that the recipient would take it more seriously — undercuts that argument. Moreover, there is simply no "junk

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R. Ex. 15, at 4-5 (Geske Decl. ¶10). When asked why the lettering "Official National Survey on Social Security," was even larger on Version 3 than the earlier versions, he said that he actually wanted the larger font size on all versions in order to "to bring attention to this particular piece." Tr. 289-90.

Copywriter Geske admitted that the survey was his idea; he came up with it as an "involvement technique," which he described as a technique, commonly used in direct mail, that is "proven" to increase responses. Tr. 252-53.¹⁵ He included the personalized references and the language, "you or your spouse has paid into the Social Security system and are receiving or expect to receive

(Cont'd)

mail" exception to section 1140. Congress enacted section 1140 to address problems created by "direct mailers," i.e. purveyors of junk mail. See *Deceptive Mailings and Solicitations to Senior Citizens and Other Consumers: Hearing before the Subcomm. on Social Security, and the Subcomm. on Oversight of the House Committee on Ways and Means*, 102d Cong., 2d Sess. 124 (Comm. Print 1992) (1992 House Hearing); *Deceptive Solicitations, Including Findings and Recommendations of the Subcommittees*, H. R. Rep. No. 9, 102d Cong. 2d Sess. 45 (1992) (1992 House Report). A "junk mail" exception would devour the rule, leaving nothing.

15. On the other hand, he also claimed that NTU planned to use the survey as the "centerpiece" for its lobbying campaign. "The results of the survey were going to be collected, tabulated, and then used literally, again, as a centerpiece for their lobbying campaign." Tr. 254. But when reminded that NTU was not even aware of the survey, that he had concocted it to increase responses, he said "I can't answer for them." Tr. 254.

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benefits in the future." He admitted that he did not actually know whether any particular recipient fell into this category; he assumed that most people did, and included the language because a higher degree of personalization is shown to increase response rates. Tr. 263.

Next, I find unconvincing NTU's assertion that it would deliberately have avoided any suggestion of an association with the government because its target audience is so hostile. The above discussion establishes, however, that Copywriter Geske deliberately included references to "Social Security," and, as Director Frank acknowledged, the Social Security program does not engender a negative response, even from those most hostile to government. Tr. 35-36. Moreover, NTU's mailers and some of its mailing lists suggest no animosity to the administration in power at the time. *See* P. Ex. 19, at 3; R. Ex. 3 ("COMMISSIONED FOR THE PRESIDENT OF THE UNITED STAPLES, THE HONORABLE GEORGE WALKER BUSH, AND MEMBERS OF THE UNITED STATES CONGRESS"); P. Ex. 19, at 8 ("The President of the United States, the Honorable George Walker Bush, the Honorable Members of the United States Congress . . . owe you a debt of gratitude and appreciation.")

I note finally that NTU knew or should have known that its mailers conveyed a false impression because the I.G.'s April 3, 2002 warning letter told them so when the I.G. attempted to elicit voluntary compliance. But NTU not did comply. Instead, it made minimal, cosmetic changes, and sent out Versions 2 and 3.

*Appendix C****B. SSA proposes a reasonable penalty of 50¢ per violation (\$274,582 total).***

Having found that NTU violated section 1140, I must now determine an appropriate penalty. The statute and regulations authorize penalties of up to \$5,000 for each piece of mail containing the violative language. Act, § 1140(b); 20 C.F.R. § 498.103.

Responding to a subpoena, NTU advised SSA that it sent out 549,164 of the mailers. P. Ex. 14.¹⁶ The I.G. proposes imposing a penalty of 500 per mailer, for a total of \$274,582. I am authorized to affirm, deny, increase, or reduce this amount. 20 C.F.R. § 498.220. In reaching my decision, I must consider the following factors: (1) the nature and objective of the advertisement, solicitation, or other communication, and the circumstances under which they were presented; (2) the frequency and scope of the violation and whether a specific segment of the population was targeted; (3) the prior history of the individual, organization, or entity in their willingness or refusal to comply with informal requests to correct violations; (4) the history of prior offenses of the individual, organization, or entity in their misuse of program words, letters, symbols, and emblems; (5) the financial condition of the individual or entity; and

16. NTU has provided numbers that do not exactly add up. Compare P. Ex. 14 with P. Ex. 16 (suggesting a total of 549,045 mailers sent — 205,663 Version 1 mailers + 291,968 Version 2 mailers + 51,414 Version 3 mailers). NTU has exclusive control of the figures, and can hardly complain that the I.G. has taken it at its word. So I accept the 549,164 figure.

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(6) such other matters as justice may require. The use of a disclaimer of affiliation with the U.S. government, SSA, or its programs is not a mitigating factor in determining the amount of the penalty. 20 C.F.R. § 498.106.

I note, initially, that 50¢ per violation is a low penalty. *Compare United Seniors*, DAB CR1075, at 18 (\$1.00 per envelope) and *National Federation of Retired Persons*, DAB CR968, at 3 (\$1.00 per mailer).

1. *Nature and objective of the solicitations and the circumstances under which they were presented.*

As discussed above, NTU's solicitations were designed to increase its "membership"¹⁷ and to raise money. Employing well-established marketing techniques, NTU deliberately employed protected language to induce recipients to open its mailers and to respond.

2. *Frequency, scope of the violation, and whether a specific segment of the population was targeted.*

NTU mailed 549,164 solicitations from January 2002 through February 2003. P. Exs. 14, 16. I consider this a substantial number of solicitations.

17. Recipients were not told that sending money made them members of NTU. Tr. 14. They were told that their contribution would "help . . . save Social Security" See, e.g., P. Ex. 17, at 10. In fact, their contributions were simply added to NTU's general revenues. Tr. 44.

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The elderly are among the most vulnerable in our population, and the group about whom Congress expressed the most concern when it enacted section 1140. SSA asserts that the elderly were targets of NTU's solicitations, which would justify an increased penalty. NTU denies that charge, claiming that it targeted a somewhat younger group, and selected names from mailing lists of those likely to share its views.

While NTU sent mailers to all of its "members" (see Footnote 17),¹⁸ the objective data shows that it also specifically targeted the elderly. That data is found at P. Ex. 16 (*see also* R. Exs. 12, 13, and 14). The document is initially confusing because it includes figures for at least two additional mailers, which have nothing to do with this case (a "Fair Tax Insert Package" and an "Abolish the IRS" mailer). Pages 1-3, 7-9, and 12-14 of P. Ex. 16 (R. Ex. 12, at 1-3; R. Ex. 13, at 1-3; and R. Ex. 14, at 1-3) contain the data for those irrelevant mailers. The *relevant* data is at P. Ex. 16, pages 4-6 (containing Version 1 mailing information), pages 10-11 (containing Version 2 mailing information); and page 15 (containing Version 3 mailing information). *See also*, R. Ex. 12, at 4-6; R. Ex. 13, at 4-5; and R. Ex. 14, at 4. Tr. 159 *et seq.*

Version 1: NTU sent solicitations to individuals selected from mailing lists provided by specific groups with which it had arrangements to share such lists. NTU mailed Version 1 to 148,238 individuals from selected mailing

18. NTU's former lobbyist, Alfred W. Cors, Jr., noted that the "average direct mail recipient and respondent" is a 70-year-old widow. Tr. 113.

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lists (including some NTU internal lists) and 57,425 to individuals whose names were in NTU's "house file," for a total of 205,663 mailers sent. Tr. 166; P. Ex. 16, at 5, 6; R. Ex. 12, at 5, 6.¹⁹ Of these 37,976 mailers were sent to individuals whose names were drawn from five group lists targeting senior citizens: Direct Mail Seniors²⁰ (providing two lists of 5,945 names and 19,253 names); American Seniors for Government Reform (providing two lists of 4,097 names and 5,290 names); and United Seniors Association PAC Donors (3,391 names). SSA Ex. 16, at 4; Tr. 163-65.

Version 2: NTU sent out 291,968 of the Version 2 mailers. Of those, more than half, 149,631 mailers, were

19. In his declaration, Director Frank agrees with the total, but divides it differently, stating that Version 1 was sent to 119,207 names selected from mailing lists and 86,456 names from NTU's own house file. R. Ex. 17, at 4 (Frank Deci. ¶ 9). (The house file consists of those who have previously responded to NTU solicitations. Tr. 37-38). NTU has not explained these figures, but it appears that in May 2002, NTU sent 57,425 mailers to individuals whose names were drawn from its house file. P. Ex. 16, at 6. To that Director Frank adds earlier mailings sent to names drawn from NTU's internal lists: NTU Petition Signers/Nondonors (7,531 mailers); NTU Email Names from 1/02 (7,886 mailers); NTU Email Names from 2/02 (6,691 mailers); NTU Email Names Non-donors (835 mailers); and NTU Expires (6,088 mailers) for a total of 86,456. P. Ex. 16, at 4. The remaining 119,207 mailers were sent to names drawn from other lists.

20. According to its list manager, Direct Mail Seniors are "older Americans" who are "are genuinely concerned about the rights of senior citizens, and have donated to a campaign addressing Social Security and Medicare issues." R. Ex. 6, at 34.

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sent to individuals whose names were drawn from groups targeting seniors: American Seniors for Government Reform (5,414 names); Seniors Against Benefit Cuts (18,814 names); Seniors Coalition (62,125 names); Seniors for Equitable Retirement (4,941 names); and Direct Mail Seniors (58,337 names). P. Ex. 16, at 10, 11; Tr. 167-69.

Version 3: NTU sent out 51,414 of the Version 3 mailers. These went exclusively to names drawn from either the house file or seniors organizations. 28,705 of the names were drawn from lists targeting seniors: Seniors for Equitable Retirement (4,047 names); Seniors Against Benefit Cuts (two lists of 3,620 names and 9,471 names); and American Seniors for Government Reform (11,567 names). P. Ex. 16, at 15; Tr. 170-71.

Thus 40% of the mailers were sent to individuals whose names were selected from senior citizen mailing lists (216,312 of 549,045).

Ryder T. Ulon is a "list broker." For the last six years, he has been NTU's exclusive account representative. His job includes identifying the best lists for NTU's mailings. R. Ex. 16. He testified that he selects the lists that he deems appropriate and he considers the content of the mailing in selecting the lists. Tr. 176, 184. He also claimed, unconvincingly, that he made "absolutely *no* effort to select retired persons, senior citizens, social security recipients or the like," and to bolster this claim, suggests that "Biker Magazine" provided one of the lists he used for the Social Security mailers. R. Ex. 16, at 1-

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2 (Ulon Decl. ¶¶ 1-2, 6); R. Ex. 6; Tr. 179. But the data shows that, in fact, *none* of the Social Security mailers went to "Biker" listees. P. Ex. 16.

Broker Ulon's testimony is misleading because he did not limit himself to the lists he drew from for the Social Security mailers. He provides a long "list of lists" from which he purportedly selected names for the "3 NTU mailings (including the Social Security package)." R. Ex. 16, at 3 (Ulon Decl. ¶ 8). But in referring to the "3 NTU mailings" he does not mean the three versions of the Social Security mailing, which are the subject of this appeal. He means the Social Security mailer in all three forms *plus* the "Fair Tax" mailer and the "Abolish the IRS" mailer. So his "list of lists" tells us virtually nothing about where the violative mailings were sent. It only suggests that the recipient names were drawn from some of the listed organizations. And in fact, R. Ex. 5 and P. Ex. 16 show that the Social Security mailing was not sent to anyone from the Biker Magazine list. The "Fair Tax" mailer went to Biker Magazine list names. P. Ex. 16, at 2.

Broker Ulon also omitted from his "list of lists" an organization called Seniors Coalition, even though 62,125 Social Security mailer recipients were selected from that list. R. Ex. 16, at 3; Tr. 169; P. Ex. 16, at 11. The "Seniors Coalition" is described as "the premier direct mail seniors list in the industry!" That list is made up of individuals concerned about senior citizen issues. The "donors" are "age 60+," and the list is recommended for any mailer trying to reach "the mature

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audience with disposable income." R. Ex. 6, at 19. Broker Ulon characterized his omission of the group as an "oversight." Tr. 169. But I find it strange that he would include Biker Magazine and multiple other organizations, to which NTU sent zero of the Social Security mailers, and omit an organization to which it mailed tens of thousands.

The evidence thus establishes that NTU targeted senior citizens for receipt of these mailers.

3. The prior history of the individual, organization, or entity in their willingness or refusal to comply with informal requests to correct violations.

While NTU was in the process of sending out Version 1, the I.G. notified NTU of its concerns, and sought voluntary compliance. P. Ex. 5. In a response that I consider less than straight-forward, NTU agreed to cooperate, and to change the package design so that it would not create the impression of SSA authorization. P. Ex. 6; see footnote 2, *supra*. But NTU's changes were superficial, and its subsequent mailers were violative, and it continued to send them out for almost a full year after receiving the I.G.'s letter.

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4. *The history of prior offenses of the individual, organization, or entity in their misuse of program words, letters, symbols, and emblems.*

SSA concedes that NTU has no prior section 1140 offenses.

5. *The financial condition of the individual or entity.*

I am satisfied that the I.G. has carefully reviewed NTU's financial records, and correctly determined that NTU is capable of paying this penalty. For its part, NTU has not argued otherwise.

6. *Such other matters as justice may require.*

I am concerned about NTU's investigative tactics in this case. It was certainly within the organization's rights to interview the I.G.'s potential witnesses. However, NTU's private investigator, John Roche, went to Laura Fischer's home where he misrepresented himself, claiming that he represented the attorney for "Agora Publishing." R. Ex. 19; Tr. 226 *et seq.* I found wholly unconvincing his assertion that this was simply "my error." Tr. 240-41. Frankly, this action alone might have justified my increasing the penalty in this case, and, had the I.G. asked that I consider it, I would seriously have entertained the prospect.

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V. Conclusion

For all of these reasons, I find that NTU has violated section 1140, and, under the authority granted me in 20 C.F.R. § 498.220, I affirm the \$274,582 CMP proposed by the I.G.

s/ Carolyn Cozad Hughes
Carolyn Cozad Hughes
Administrative Law Judge

**APPENDIX D — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT
DENYING PETITION FOR REHEARING
DATED JANUARY 9, 2009**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 07-3381

NATIONAL TAXPAYERS UNION

Petitioner,

v.

UNITED STATES SOCIAL SECURITY
ADMINISTRATION; OFFICE OF THE
INSPECTOR GENERAL

Respondent.

SUR PETITION FOR PANEL REHEARING

Present: FUENTES, HARDIMAN and GARTH,
Circuit Judges

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing by this panel, the Petition for Rehearing is hereby DENIED.

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BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: January 9, 2009

**APPENDIX E — EXCERPTS FROM OPINION OF
HHS DAB APPELLATE DIVISION IN *SOCIAL
SECURITY ADMINISTRATION v. NATIONAL
FEDERATION OF RETIRED PERSONS***

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

DATE: June 20, 2003

Civil Remedies CR968
App. Div. Docket No. A-03-16
Decision No. 1885

In the Case of:

Social Security Administration,

Petitioner,

- V. -

National Federation of Retired Persons,

Respondent.

**RECOMMENDED DECISION ON REVIEW OF
ADMINISTRATION LAW JUDGE DECISION**

Appendix E

* * *

Discussion

NFRP makes numerous contentions to this appeal. We address them in the four sections below. Section A addresses the contentions regarding the ALJ's section 1140 liability findings. Section B addresses NFRP's contention that the ALJ abused her discretion by doubling the CMP proposed by SSA. Section C addresses NFRP's constitutional arguments. Finally, Section D addresses NFRP's contentions regarding the ALJ's evidentiary and other rulings.

A. Section 1140 liability

Section 1140 establishes two liability standards, which we refer to as the "knowledge standard" and the "reasonableness standard." A person violates section 1140 under the knowledge standard if he uses Social Security program words in a solicitation or other communication "in a manner which [he] knows or should know would convey . . . the false impression that such item is approved, endorsed, or authorized by the Social Security Administration[.]" Under the reasonableness standard, a person violates section 1140 if the communication "reasonably could be interpreted or construed as conveying" the false impression that it was approved, endorsed, or authorized by SSA. For narrative purposes, we first consider the ALJ's findings under the "reasonableness" standard.

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1. Substantial evidence supports the ALJ's finding that the contested mailers "reasonably could be interpreted or construed as conveying the false impression" of SSA approval, endorsement, or authorization.

On its face, the reasonableness standard does not require SSA to establish that some person actually had a false impression that the communication was endorsed, approved, or authorized by SSA. Section 1140 requires only that a person of average intelligence "could" get such a false impression from inspecting the communication. In addition, section 1140 does not require a factual misrepresentation or proof that some person was actually deceived by the communication. It requires only that the communication leave or create a "false impression." An impression is "a notion, feeling, or recollection, esp[ecially] a vague one." Webster's New World Dictionary (2d College ed.).² A false impression, then, is a suspicion or vague notion based on an incomplete or erroneous understanding of the facts.

* * *

2. In the America Heritage Dictionary (4th ed. 2000), the primary definition of "impression" is "[a]n effect, feeling, or image retained as a consequence of experience." A secondary definition is "a vague notion, remembrance, or belief."

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2. *Substantial evidence supports the ALJ's finding that the NFRP knew or should have known that its mailers would convey the false impression proscribed by section 1140.*

Section 1140's knowledge standard is in fact a negligence standard. *See Huntzinger v. Hastings Mutual Ins. Co.*, 143 F.3d 302, 312 (7th Cir. 1998) ("knew or should have known" are words connoting a liability standard sounding in negligence); *Levine v. CMP Publishers, Inc.*, 738 F.2d 660, 672 (5th Cir. 1984). Thus, NFRP has violated section 1140 if it knew or, in the exercise of reasonable care, should have known that the mailers would create the false impression of official endorsement, approval, or . . .

* * *

C. Constitutional claims

During the proceedings before the ALJ, NFRP contended that SSA's enforcement action amounted to an unlawful infringement of its First Amendment rights. *See* NFRP Motion for Summary Judgment. The ALJ declined to address this constitutional challenge, finding that she was bound to apply section 1140 and the accompanying regulations. *See* Rulings and Summary of Telephone Conference, dated April 16, 2002.

It is well-settled that administrative tribunals do not have the power to declare a statute or regulation unconstitutional. *Sentinel Medical Laboratories, DAB*

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No. 1762 (2001). Section 498.204 of SSA's regulations reflects this principle, stating that an ALJ lacks the authority to "[f]ind invalid or refuse to follow Federal statutes or regulations." 20 C.F.R. § 498.204.

NFRP contends that section 498.204 does not apply because it is alleging only an "unconstitutional application" of federal law, not that the law is invalid. NFRP Brief at 97-98. However, the terminology used by NFRP in its argument calls to mind a claim that the statute and regulations are unconstitutional as applied. We interpret section 498.204 as precluding the ALJ from considering both facial and "as applied" challenges to the statute and regulations. Thus, to the extent that NFRP's contention is that section 1140 and its regulations are unconstitutional as applied, the ALJ committed no error in refusing to address it. In any event, as we now explain, the constitutional arguments made by NFRP are substantively meritless or constitute facial challenges to the statute that are beyond our authority to address.

* * *